DOCUMENT RESUME

ED 296 355 CS 211 362

AUTHOR Sanders, Craig
TITLE Aftermath of the Death of the St. Louis Globe-Democrat: Are Failing Newspapers Still Worth Preserving?
PUB DATE Jul 88
NOTE 38p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (79th, Portland, OR, July 2-5, 1988).
PUB TYPE Speeches/Conference Papers (150) -- Information Analyses (070) -- Reports - Evaluative/Feasibility (142)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Competition; Government Role; Legal Problems; Media Research; *Newspapers; Publishing Industry
IDENTIFIERS Antitrust Laws; Editorial Policy; *Joint Operating Agreements (Newspapers); Media Government Relationship; Newspaper Ownership; *Newspaper Preservation Act 1970; Saint Louis Globe Democrat

ABSTRACT

This paper contends that the failure of the St. Louis "Globe-Democrat" raises questions not only about whether the United States Justice Department's Antitrust Division should have worked harder to keep the St. Louis joint operating agreement (JOA) alive, but also about the efficacy of the Newspaper Preservation Act in preserving editorial rivalry by allowing commercial rivalry to cease in situations where both types of competition are in danger. The paper argues that the Antitrust Division's intervention in the St. Louis JOA failure was correct and that future JOA failures should be reviewed by the government. The paper examines (1) the Newspaper Preservation Act; (2) the decline of direct newspaper competition; (3) JOAs and failing newspapers; (4) the government's role in JOAs; (5) the possibility that JOA failures violate antitrust laws; (6) how JOAs could gain by failing; (7) the intervention by the antitrust division in St. Louis; (8) the failing company tests for publishers; (9) whether JOA failures merit government intervention; and (10) a case for saving failing JOAs. The paper concludes that unless the Newspaper Preservation Act is amended so that editorial competition can be preserved, the government should continue to intervene in JOA failures in the same manner that it did in St. Louis. (Ninety-two notes are included.) (MS)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED296355

AFTERMATH OF THE DEATH OF THE ST. LOUIS GLOBE-DEMOCRAT: ARE FAILING NEWSPAPERS STILL WORTH PRESERVING?

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Craig Sanders

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☐ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

By Craig Sanders
Graduate Student
Indiana University
Bloomington, Indiana 47405

A Paper Presented to the Law Division of the Association for Education in Journalism and Mass Communications, Annual Convention, July 2-5, 1988, Portland, Oregon.

CS011360

BEST COPY AVAILABLE

AFTERMATH OF THE DEATH OF THE ST. LOUIS GLOBE-DEMOCRAT: ARE FAILING NEWSPAPERS STILL WORTH PRESERVING?

Introduction

The October 1986 closing of the St. Louis Globe-Democrat was so abrupt the newspaper did not have time to write its own obituary.[1] That story would have told how the Globe became the first daily newspaper to fail despite antitrust exemptions granted it by the Newspaper Preservation Act.[2] Those exemptions had enabled the Globe to merge with its chief rival, the St. Louis Post-Dispatch, and establish a joint operating agreement (JOA) that ended commercial competition between the two newspapers in an effort to preserve editorial competition by keeping the Globe alive.

The Globe would have died three years earlier had it not been for the intervention of the U.S. Justice Department's Antitrust Division. When Globe owner Newhouse Newspapers proposed closing the newspaper in 1983 the Antitrust Division fought to keep the Globe alive to thwart a daily newspaper monopoly. Although apparently successful at the time, those efforts brought the newspaper readership of St. Louis just three years of continued editorial rivalry.

The Globe's failure, therefore, raises questions not only about whether the Antitrust Division should have worked harder to keep the St. Louis JOA alive, but also about the efficacy of the Newspaper Preservation Act in preserving editorial rivalry by allowing commercial rivalry to cease in situations where both types of rivalry are in danger. If the Globe's death is a harbinger of future JOA failures that will result in editorial monopolies in places where commercial monopolies are lawfully sanctioned, then the Newspaper Preservation Act may only slow down an inevitable movement toward both commercial and editorial monopolies in JOA cities. If so, then perhaps the Antitrust Division should accept that modest effect as the sole goal of the Newspaper Preservation Act. The Antitrust Division need not find that a JOA failure raises any antitrust concerns. However, this paper argues that the Antitrust Division's intervention in the St. Louis JOA failure was correct. JOA failures in which the JOA merger remains after the "failing" newspaper dies raise antitrust concerns, specifically the prospect that JOA newspapers may abuse the Act's antitrust exemption in an attempt at economic gain. This paper argues that future JOA failures should be reviewed by the government.

The Newspaper Preservation Act

The Newspaper Preservation Act, adopted in 1970, allows daily competing newspapers to conduct joint printing operations, allocate exclusive and non-competing publication cycles, fix advertising and circulation prices, pool revenues and share profits.[3] For a JOA to qualify for the Newspaper Preservation Act's antitrust exemptions,

at least one of the JOA newspapers must be a "failing newspaper," which the act defines as ". . . a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure."[4] The JOA publishers must also publish newspapers with editorial content independently determined.[5]

The premise of the Newspaper Preservation Act is that unless allowed to merge with a competing newspaper, a failing newspaper would die. The Act thus partially embodies the judicially created failing company doctrine that a merger between two competitors has no adverse effect upon the market if the failing company would have disappeared as a competitive force.[6] The Act is a policy judgment by Congress that preserving editorial competition is worth the trade-off of losing direct competition for advertising and circulation.[7]

Decline of Direct Newspaper Competition

Since World War II, direct competition between daily newspapers has dramatically declined.[8] In only 21 cities do independently owned daily newspapers compete commercially and editorially.[9] This decline has occurred largely because of changes in newspaper advertising markets and the economies of scale of the printing industry.

Historically, daily newspapers differentiated themselves by segmenting audiences.[10] Newspapers lived off the advertisers who wanted to appeal to the newspaper's audience.[11] Differentiation was done through editorial content, partisan identification, social and economic class appeal and time of publication.

But since the late 1940s, newspaper differentiation has broken down. Although demand for newspaper circulation and advertising has

grown steadily, electronic media and alternative print media have increased advertising alternatives available. Advertisers have either curtailed newspaper advertising or concentrated their newspaper advertising dollars in the largest circulation newspaper in a given market.[12]

So long as a market's demand for newspaper circulation and advertising space continues to grow, commercially competitive newspapers should each gain enough circulation and advertising to prosper. But when a market's advertising and circulation demand stagnates or declines, competitive daily newspapers can only gain at the other's expense.[13]

In the printing industry, the more copies a publisher sells, the lower the unit cost per copy.[14] Publishers could reduce average per copy cost by either cutting expenditures, particularly for editorial and production departments, or seeking to maximize circulation.[15] The latter, however, enhances the desirability of the newspaper as an advertising medium and increases circulation revenue.

More often than not, economic competition between newspapers of similar content trying to sell to the same audience has meant that only one newspaper is likely to survive. The survivor will be the newspaper that gains enough of a circulation edge so that the difference in average per copy cost enables the dominant circulation newspaper to undersell its rival's advertising rates. As economies of scale lower the average cost of producing advertisements, the dominant newspaper can lower its advertising rates to reflect that.[16] If the junior newspaper matches the dominant newspaper's

advertising rates, the junior newspaper risks dropping below its advertising production costs and losing money.[17]

As the circulation gap between competing newspapers widens, the junior newspaper is said to be caught in a downward spiral syndrome.[18] As the junior newspaper loses subscribers, it attempts to hold down its mounting average per copy costs by curtailing expenses, particularly in editorial and promotion. This results in the junior newspaper being perceived as a less desirable product and a further loss of circulation which in turn diminishes the newspaper as a desirable advertising medium.[19] When a junior newspaper's share of the circulation market drops below 35 percent and its share of the advertising market drops to about 25 percent, its financial problems will usually force it out of business.[20]

JOAs and Failing Newspapers

Joint operating arrangements are said to reverse the downward spiral by offering efficiencies and economies of scale that eliminate the potential losses one or more newspapers might incur if they had to provide production, circulation and business functions themselves.[21] Typically, JOA newspapers form an agency company in which each holds 50 percent ownership. The agency conducts production, business, circulation and advertising sales functions. By combining these operations, JOA newspapers operate at lower per copy costs than they would have as separate newspapers. More importantly, the junior newspaper gains access to advertising markets that it previously was locked out of.[22]

Critics describe the Newspaper Preservation Act as special

interest legislation that does not save failing newspapers and erects high entry barriers.[23] Since the law's adoption, JOAs have formed in only four cities -- Anchorage (1974), Cincinnati (1978) Chattanooga (1980), and Seattle (1983)[24] -- with a fifth proposed in Detroit.[25] In some cities, the weaker newspaper's plea to the dominant newspaper for a joint agreement went unheeded and the junior newspaper died.[26]

The Government's Role In JOAs

The only regulatory power the Newspaper Preservation Act confers on the government is the authority given the U.S. Attorney General to decide if JOAs created after July 24, 1970 qualify for the Act's antitrust exemptions.[27] To qualify for antitrust exemptions, post-1970 JOA applicants must demonstrate that one of the JOA newspapers is a failing newspaper.[28] That assertion is subject to a public hearing at which JOA opponents, including the Antitrust Division, may rebut the failing newspaper's evidence that it is a failing newspaper.[29]

JOAs formed before July 24, 1970 are not subject to Attorney General approval.[30] Although at least one of the newspapers in pre-1970 JOAs had to be a failing newspaper for the JOA to qualify for antitrust exemptions, there was no review mechanism.[31]

Only that behavior specified by the Newspaper Preservation Act is shielded from antitrust review. The Act prohibits JOA behavior that would be unlawful by a newspaper acting as a single entity.[32] A JOA could lose its antitrust exemptions if it failed to publish newspapers with editorial content independently determined.[33]

Do JOA Failures Violate Antitrust Laws?

Without the Newspaper Preservation Act, the creation of a JOA might be subject to legal action condemning it as an anti-competitive illegal merger. Absent the Act, it might be unlawful for two competing newspaper publishers to cut a deal that ended competition between them if such a deal gave the two publishers monopoly power.[34] The Act, though, gives publishers the power to lawfully end commercial competition, even if that results in monopoly power. In return, financially struggling newspapers will presumably not go out of business, as they claim they might without a JOA.

The Antitrust Division does not take the position that JOAs should be forced to continue publishing editorially competing newspapers forever.[35] If a failing JOA newspaper was the financial liability its publisher claimed it to be, then it would be difficult for anyone to seriously argue that a failing newspaper should be kept alive to satisfy a policy goal.[36] For if a failing newspaper's money-losing was allowed to fester long enough, the financial health of the other JOA newspaper might become endangered. It probably was not the intent of the Newspaper Preservation Act to save editorial competition by subjecting a healthy newspaper to near economic ruin.

How JOAs Could Gain by Failing

Since the passage of the Newspaper Preservation Act, JOAs have "failed" in Anchorage, Alaska; Bristol, Tenn.; St. Louis; Columbus, Ohio and Oil City-Franklin, Pa.[37] Only the St. Louis and Oil City-Franklin failures triggered Antitrust Division review.[38]

In Columbus and Anchorage, the JOA partners separated. Although an editorial monopoly resulted in Columbus, it occurred after the JOA ended. But Newhouse stood to gain by closing the Globe-Democrat because its merger with Pulitzer continued after the Globe was to close.[39] By closing the Globe, the St. Louis JOA would be rid of an unprofitable division, presumably enhancing the St. Louis JOA's economic performance. If all Newhouse had stood to gain from closing the Globe was the newspaper's salvage value, then the Antitrust Division could be confident that Newhouse would have made every reasonable effort to return the Globe to good financial condition.

A newspaper's sale value represents a buyer's opinion of how potentially viable the newspaper may become. A newspaper's salvage value is what the sale of presses, equipment, property and other assets will bring. The salvage value should be less than the sale value since the salvage value represents a newspaper's minimum worth. However, as expectations that a newspaper will fail increase, the sale value drops toward the salvage value. Therefore the more the selling publisher is able to make the newspaper appear to be a long-term finacially viable investment, the higher the sale price of the newspaper.

Ordinarily, a newspaper said by its owner to be failing would be expected to have a sale value closer to its salvage value. A newspaper on the verge of its second failure, even with the help of a JOA, should be even less valuable to prospective buyers. Thus Newhouse had had an incentive for years to maintain the financial health of the Globe.

Yet Newhouse also had an incentive not to do so. The Globe

had already weathered one "failure." Had it been unable to negotiate a JOA with Pulitzer, the Globe and Newhouse would have gone out of the newspaper business in St. Louis. However, the Newspaper Preservation Act enabled Newhouse to go from being sole owner of a money loser to a partner in a money-making company, the St. Louis JOA. That is, of course, why failing companies seek merger partners. But what distinguishes JOA mergers from other mergers is the lack of antitrust review of JOA mergers, particularly those formed before 1970.

Now Newhouse had "failed" again and it stood to gain something more valuable than the salvage value of the Globe. By eliminating the expense of publishing the Globe, the profits of the St. Louis JOA would be enhanced. That would remain true even though theoretically the Globe's departure deprived the St. Louis JOA of revenue from an advertising market. Losing that market would be a minimal loss because JOAs sell the bulk of their advertising in combination.[40] Little of that advertising would be lost by the Globe's closing. And the Globe's second "failure" might discourage others from seeking to fill the publication cycle left empty by the Globe's departure.

Maximizing return on investment is not necessarily a violation of antitrust laws unless it has an anticompetitive effect. If the publisher of a dominant JOA newspaper agrees to continue sharing profits with the publisher of the failing JOA newspaper, even after the failing newspaper ceases publication, that should be considered a private contract matter, not a public policy concern. It would only become a public policy concern if the partners conspired to

prevent new rivals from entering the newspaper market.

But by closing the failing newspaper the efforts of the failing newspaper company to enhance its investment in the JOA would be coming at the expense of a law that is designed to prevent editorial monopolies, not serve as a vehicle for creating them. JOAs are shared monopolies, or duopolies, that can be expected to maximize profits in ways similar to those of single monopolists.[41] So long as the JOA publishers both publish newspapers, the newspaper reading public is at least least getting editorial competition in return for the JOA being lawfully allowed to act as a duopolist. But once the failing newspaper closes, the public is still getting duopoly, but without the benefit of editorial competition.

Intervention in St. Louis

Courts have held that enterprises do not violate antitrust laws if they gain monopoly power through such honest competitive means as offering a superior product or efficiencies of production. Nor does a business violate antitrust laws if monopoly is thrust upon it due to its rivals going out of business because of their own ineptness.[42]

But the Antitrust Division saw in the 1983 planned closing of the Globe a possible two-step monopolizing scheme. First Newhouse and Pulitzer used the Newspaper Preservation Act to lawfully eliminate commercial competition. Then they sought to create a daily newspaper editorial monopoly by closing the Globe. The Antitrust Division feared that unless it reviewed the Globe's closing, other JOAs might follow the example of the St. Louis JOA and seek to

maximize profits by creating editorial monopolies. This the Division considered a possible abuse of the Newspaper Preservation Act because the Act was meant to promote continued editorial competition, not serve as a shortcut to both commercial and editorial monopoly.[43]

The Antitrust Division did not disapprove of JOAs ending editorial competition if the financial losses of the failing newspaper were so great as to endanger the financial well-being of the surviving newspaper.[44] However, the Antitrust Division feared that JOA publishers might manipulate a JOA's financial condition and create a paper loss for the weaker newspaper that the JOA could use as an excuse to close it.[45] Or the JOA might deliberately allow the editorial quality of the weaker newspaper to deteriorate in hopes readership would drop and thereby cause a corresponding economic downturn.

However, if the Antitrust Division were to find evidence of contrived losses through manipulation of editorial content, the First Amendment might preclude the Division from doing much about it.[46] An attempt by the Antitrust Division to order a JOA to continue publishing competing newspapers could cause First Amendment problems. The Supreme Court in Miami Herald Publishing Co. v. Tornillo[47] ruled that government regulation that has the effect of dictating a newspaper's size or content violates the First Amendment.[48]

The government, though, could avoid First Amendment problems by confining its review to economic behavior. That the First Amendment does not justify anti-competitive behavior is well established in

law.[49] The government has successfully avoided First Amendment problems in breaking up anti-competitive newspaper mergers[50] and stopping anti-competitive business practices in the newspaper industry.[51]

JOAs and the Failing Company Test

In the case of the Globe, the Antitrust Division demanded Newhouse ". . . clearly demonstrate that (the Globe's losses were) an actual financial drain on its publisher and not merely a bookkeeping loss."[52] Newhouse had to demonstrate: (1) that the resources of the Globe were so depleted and its prospects for rehabilitation so remote that the Globe was facing the clear probability of a business failure. (2) That Newhouse had made a good faith effort to sell the Globe to a buyer who would be willing to publish the newspaper in both editorial and commercial competition with the Post.[53] This failing company test, the Antitrust Division hoped, would ensure continued editorial competition in St. Louis and discourage editorial monopolizing in JOAs elsewhere.[54]

The Globe was found to have depleted resources with an unlikely prospect for rehabilitation.[55] But having made that finding, the Antitrust Division demanded Newhouse solicit buyers willing to do the very thing the Antitrust Division had determined Newhouse was unlikely or unable to do -- rehabilitate the Globe into a commercially viable enterprise that could compete against the Post. The Antitrust Division reasoned that editorial competition would follow from commercial competition.[56]

Presumably, if the Globe's condition and the St. Louis daily

newspaper market was as bad as Newhouse claimed it to be, no astute businessman would buy the newspaper. Even if the Globe were sold, the new owner was unable to turn the newspaper around, and the Globe closed, that would be the result of market forces and not any direct action of Newhouse and Pulitzer. But if the Globe losses had been contrived by Newhouse as part of a profit maximizing scheme, or if the losses had been the result of Newhouse's ineffective management; then a new owner might be able to not only reverse the Globe's financial misfortunes, but also win away enough advertising from the Post to negate the gains the St. Louis JOA made by eliminating a publication cycle.[57] The prospect of this latter scenario, the Antitrust Division hoped, would deter failing JOA newspapers elsewhere from following Newhouse's lead.[58] If the purchaser of the failing newspaper in the only JOA in the country reportedly losing money[59] could turn the Globe around, that, the Antitrust Division hoped, would give pause to other JOA publishers considering allowing their failing newspaper to deteriorate to the point where a closing could be justified.[60]

Hard Times for the Globe

Newhouse sold the Globe in early 1984 at fire-sale prices to newspaper publishing novice Jeffrey Gluck.[61] Gluck's inexperience quickly showed in an ill-fated attempt to start an afternoon newspaper to supplement the morning Globe and in two unsuccessful attempts to launch a Globe Sunday edition.[62] Gluck shrank the Globe's staff, pruned editorial costs and reduced the newshole size, all the while losing circulation and advertising to the Post-

Dispatch, which had switched from afternoon to morning publication.[63]

A year-and-a-half later Gluck filed for bankruptcy, claiming debts of $8 million. A bankruptcy judge removed Gluck as publisher, citing his "incompetence and gross mismanagement." The Globe suspended publication December 6, 1985.[64]

In late January 1986, John B. Prentis III and William E. Franke purchased the Globe.[65] Barely five months later, the Globe again had its back against the wall. Prentis and Franke sought a state-backed $15 million bond issue to finance the purchase of a press and a new headquarters building.[66] The Missouri Supreme Court refused to rule immediately on a suit challenging the constitutionality of the bonds. The Globe closed the next day.[67]

During its agonizing fight for life, the Globe's circulation declined from 255,141 in 1983 to 145,000 at its death. During the same time, the Post-Dispatch grew from 230,025 to 314,133.[68] The Post was far ahead of the Globe in advertising share.[69]

The experience of the Globe was similar to that of the Chattanooga Times when its JOA with the Chattanooga News-Free Press dissolved in 1967.[70] The Times was able to survive on its own for awhile, but by the 1970s began trailing the News-Free Press in circulation and advertising lineage.[71] The Times lost $2.7 million between 1977 and 1979.[72] Another JOA was arranged in 1980.[73]

On the other hand, the Anchorage News survived a JOA divorce after an out-of-court settlement in 1978 ended the JOA four years after it was formed to save the faltering News.[74] The News initiated the suit because it believed the JOA terms favored the Anchorage

Times. The News faced the same bleak conditions the Globe faced after it left the St. Louis JOA. The News lacked a production facility and was far behind the Times in advertising and circulation.[75] McClatchy Newspapers purchased 80 percent of the News' stock and invested millions of dollars in the News to make it a viable competitor with the Times.[76] Today, the News claims to be the dominant Anchorage newspaper.[77]

Do JOA Failures Merit Government Intervention?

The Antitrust Division could have allowed the Globe to die without asking Newhouse to meet a failing company test. If there was a demand in St. Louis for a competing daily newspaper, another publication would fill the void left by the Globe's death. There is evidence that closing a JOA newspaper would likely have only a minimal negative effect on either advertising or editorial markets. And the Antitrust Division could avoid wasting economic resources during the time that the government attempted to determine if the "failing" newspaper was a failing company.[78]

Closing the weaker JOA newspaper would not adversely affect advertising markets because most advertising space sold by JOA newspapers is sold in combination.[79] The combination rate is set just above the price for space in the larger circulation newspaper. Thus the combination rate is a discount from the combined single buy rates of both newspapers.[80] The existence of combination rates coupled with revenue pooling means that JOA newspapers do not check each other's advertising rates as happens in non-JOA cities with competing daily newspapers. In every JOA, there will be a small

number of advertisers who buy only in the weaker newspaper.[81] The closing of the weaker JOA newspaper would deprive those advertisers of a daily newspaper advertising medium. But advertising in failed newspapers generally moves into other newspapers in the market.[82] Whatever monopoly power the surviving newspaper has over newspaper advertising prices would remain unchanged from what power that newspaper had before the death of its JOA partner newspaper. That power would, as before, continue to be checked to the extent that radio, television, free circulation shoppers, and suburban newspapers are able to offer themselves as suitable substitutes for metropolitan daily newspaper advertising.[83]

Competing newspapers are not the only forum for the dissemination of competing messages. The First Amendment guarantees that public streets and buildings may be used to exercise freedom of expression.[84] The availability of job printers provides an opportunity to distribute messages through handbills, flyers or by creating an alternative newspaper. Broadcasting, public access cable television channels, magazines and non-daily newspapers provide forums to reach a mass audience.

The Newspaper Preservation Act does not directly address the question of whether other mediums are suitable substitutes for competing daily newspapers as a means of promoting the marketplace of ideas. The Act assumes that an important way to assure diversity of opinion is preserving editorial voices through antitrust exemptions.

However, this philosophy may be more theoretical than actual. Content analysis studies have found that JOAs do not necessarily

lead to the diversity of editorial voices envisioned by the Newspaper Preservation Act.[85] JOA newspapers exhibit no significant differences in staff size, total news lines or proportion of space used for news columns.[86] Compared to the behavior of a single owner newspaper, the only significant difference in behavior is that JOA newspapers subscribe to more wire services than do single owner newspapers.[87]

Nor is the behavior of JOA newspapers in editorial effort significantly different from the editorial behavior of non-JOA competing newspapers. In both situations, the content of editorially competing dailies is remarkably similar.[88] Two reasons have been advanced to account for these findings. Competing newspapers may attempt to write their stories in a manner that makes them appear to be different than what appears in the rival newspaper, but the types of news reported and the approach taken to covering the news will be virtually the same because most journalists share the same professional values as to what constitutes news and how it should be reported.[89] Secondly, mass circulation daily newspaper owners believe that to survive financially they must compete for the widest audience possible. This results in newspapers appealing to that audience in a similar way.[90]

A Case for Saving Failing JOAs

The content similarity of JOA newspapers may cast doubt on the ability of the Newspaper Preservation Act to foster its goal of diversity of editorial voices. It is not necessarily a persuasive case against the value of competing editorial voices. Content

similarity only means that content is more alike than different. What differences there are in content may be significant enough to support a policy of maintaining daily newspaper competition.

The experience of the Globe after its sale by Newhouse suggests the premise of the Newspaper Preservation Act may have been correct. Failing newspapers need a protected merger with another newspaper to continue competing editorially. The Globe's experience raises questions about how realistic it is to believe a failing newspaper that resumes commercial competition against its former JOA partner can survive. The fact the Globe failed under new ownership was not the fault of the Antitrust Division, unless it can be argued that the Division had a better alternative than the one it pursued in St. Louis.

The Antitrust Division had a range of policy choices in St. Louis. It could have threatened Newhouse and Pulitzer with an antitrust action if the Globe closed. Newhouse might have then taken steps to better manage the Globe's to reduce its losses. However, forcing the JOA to continue unchanged might also do nothing to alleviate the JOA's financial problems. The Globe would remain a failing newspaper and the Post might suffer serious financial damage.

A second alternative would have been to demand Newhouse sell both the Globe and its share of ownership in the St. Louis JOA. This might attract higher quality buyers than were attracted by the sale of the Globe as a stand-alone entity. But if the Globe's new owner was unable to turn the newspaper around, the Antitrust Division would face the same dilemma it had with Newhouse whereby the Globe

was worth more dead than alive.

A third alternative would have been to demand that the Post and Globe be published on the same cycle. This would be efficiency-enhancing by reducing production costs and virtually eliminating the cost of a delivery cycle. The Newspaper Preservation Act does not require that the competing editorial voices be published on opposite publishing cycles.

However, the JOA's production capacity might not be enough to produce two newspapers of the same size that they were before going onto the same cycle. One or both newspapers might have to reduce the size of its newshole or print some sections earlier, thereby possibly losing some of the production efficiency gains. The Post and Globe might claim this violates the Tornillo rule because it would have the effect of dictating content. But there is precedent for two JOA newspapers publishing on the same cycle. The Salt Lake City JOA publishes two Sunday newspapers on the same cycle.[91]

A fourth alternative would have been a combined edition of the Post and Globe. The Newspaper Preservation Act does not necessarily require that separate editions be printed. It only requires that there be no merger or combination of editorial staffs and that editorial content be independently determined. Under this proposal, there would be one JOA newspaper with two publishers sharing its space. So long as the publishers determined independently the content in their share of the space, there would be no violation of the Newspaper Preservation Act's independent editorial content clause. This common carrier concept has been proposed for Saturday and Sunday editions in the Detroit JOA.[92]

However, trying to negotiate on a daily basis what the Detroit newspapers have proposed doing on weekends likely would trigger stiff opposition from publishers jealous of protecting their turf. Production constraints would force one or both newspapers to reduce their daily newshole or alternate certain sections. This might reduce, rather than enhance editorial competition since one or both newspapers would be unable to offer a complete daily newspaper package. Neither newspaper would want to give up publishing news and sports sections every day. Thus subscribers would be receiving a product containing massive amounts of duplicated content. Since newspapers tend to cover the same types of news, the combined JOA edition might contain two stories of many news events. Consumers would be forced into buying something they probably would not want -- the editorial content of the newspaper they did not purchase before the JOA combined the two newspapers into a single edition. And publishers could claim this "common carrier" concept violates the Tornillo rule.

Nonetheless, the combined edition idea offers possibilities if it is accepted that a combined JOA edition does not have to be duplication of two conventional newspapers. The Newspaper Preservation Act also does not require JOA newspapers to maintain news, sports, and feature sections in the same manner in which most newspapers publish those sections. The Globe-Democrat could be published in a much different form than the Post-Dispatch, which could remain a conventional newspaper. It might be that the "new" Globe might be little more than an editorial page section and, perhaps, a news section that competed for news with the Post.

A final alternative would have been allowing Newhouse to sell the Globe as an independent entity with the Globe's new owner enjoying a right of access to the JOA's production and distribution facilities. Newhouse could retain its JOA ownership rights and share profits with Pulitzer. So long as the Globe's new owner could afford to pay for it, the JOA would have to print the Globe and distribute it.

This would ensure the new Globe publisher of access to a press of equal quality as the one used to print the Post. It would also spare the new Globe publisher the burden and expense of starting up a distribution system. The Globe's chance of survival would be enhanced because the new publisher would not be burdened with high start-up expenses of establishing production and circulation departments. However, Pulitzer and Newhouse could be expected to argue that this forced right of access devalues the St. Louis JOA by depriving it of the freedom to use its property in whatever manner it wishes.

Do Publishers Know Best?

Many of these alternatives entail second-guessing by the Antitrust Division of matters normally reserved to the newspaper owners who better know newspaper market forces than do government attorneys. The idea of the Antitrust Division regulating newspapers for whatever reason is not only contrary to the Division's primary mission, but also a venture into uncharted territory. The Antitrust Division, unlike such governmental entities as the Federal Communications Commission, lacks legislative authority to regulate

the news media and the Antitrust Division is not an administrative agency.

All of the aforementioned alternative policies involve some form of government regulation that has never been tried. It is uncertain how far the courts would allow the Antitrust Division to go in using the Newspaper Preservation Act as justification for regulating JOA newspapers in an effort to preserve competing editorial voices. Not only are there First Amendment problems, the JOA newspapers involved, if not the daily newspaper industry, could be expected to bitterly oppose government regulation. The political clout that newspaper publishers could bring to bear must not be underestimated.

Given these constraints, the Antitrust Division appers to have little choice but to turn to the marketplace, as hostile as it may be for failing newspapers, as the only viable place for the government to seek to keep alive editorial competition in failing JOAs.

Conclusion

Perhaps Congress should consider amending the Newspaper Preservation Act to prohibit the publisher of a failing newspaper from remaining in a JOA merger once the failing newspaper closes. Therefore, the failure of a JOA newspaper would be no different than the failure of a competing newspaper in a non-JOA city. This change might better serve the purpose of preserving editorial competition because the publisher of the failing newspaper in the JOA would have more to lose by closing the newspaper than is the case now. If the

publisher of the failing newspaper were to lose ownership or interest in the JOA upon the closing of the failing newspaper, that would be an incentive for the publisher to make strenuous efforts to operate the newspaper as efficiently and prudently as possible.

But until such a change is made, the government should continue to intervene in JOA failures in the same manner that it did in St. Louis. That approach, forcing the offering for sale of the failing JOA newspaper, may not offer the most favorable prognosis for preserving competing editorial voices. However, it represents a better public policy choice than allowing publishers of failing JOA newspapers to close their newspapers at will.

It is one thing if economic forces cause a newspaper to die. It is quite another matter if a JOA newspaper dies because of a conspiracy or deliberate action taken by the failing newspaper's owner. Unless future JOA failures are reviewed, there might be nothing to prevent JOA publishers from creating editorial monopolies in cities where there need not be one except for the economic gain of the JOA newspapers.

REFERENCES

1. The only indication that the Oct. 29, 1986 edition would be the Globe-Democrat's last was a story reporting the newspaper would close unless the Missouri Supreme Court immediately considered a challenge to the constitutionality of a state-supported $15 million bond issue to buy a new press. Otherwise, the newspaper would not be able to tolerate its losses any longer. Court Action on Bonds to Decide Fate of Globe," St. Louis Globe-Democrat, Oct. 29, 1986, at 1. col. 1.

2. 15 U.S.C. Sections 1801-1804 (1980) [hereinafter Newspaper Act].

3. Newspaper Act, Sec. 1802 (2). "The term 'joint newspaper operating arrangement' means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspapers, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution . . ."
Before passage of the Newspaper Preservation Act, most of these activities were found to violate antitrust laws. United States v. Citizen Publishing Co., 280 F. Supp. 978 (D.C. Ariz. 1968); aff'd, 394 U.S. 131 (1969).

4. Id. Sec. 1802 (5): "The term 'failing newspaper' means a newspaper publication which, regardless of its ownership or affiliations is in probable danger of financial failure."

5. Id. Sec. 1802 (2): "Provided, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined."

6. International Shoe v. F.T.C. 280 U.S. 291, 298 (1930).

7. Examples of other legislative antitrust exemptions include: exemptions allowing farmers to join together in cooperative associations [15 U.S.C. Sec. 17 (1980)], an exemption for collective bargaining [29 U.S.C. Sec. 101-15 (1980)], and exemptions to allow certain bank mergers found to be unlawful under antitrust laws [12 U.S.C. Sec. 1828(c) (1980)]. Courts have sanctioned antitrust exemptions in mergers where "countervailing competitive, economic, or social advantages" result from the mergers. Brown Shoe Co. v. United States 370 U.S. 294, 334 (1962).

8. J. Rosse, The Decline of Direct Newspaper Competition, 30 J. of Comm. 65, (Winter 1980) at 66. [hereinafter Decline of Competition] Of the 1,297 U.S. cities in 1923 with daily newspapers, 502 (38.7 percent) had separately owned, directly competing newspapers. By 1933, 243 of 1,426 daily newspaper cities (17 percent) had such competing newspapers. By 1948, the number of competing newspaper cities had declined to 109 of 1,392 (7.8 percent.) The number has been steadily dwindling ever since. (Figures exclude cities with JOAs and cities in which two newspapers are published by the same publisher). Id.

9. Those cities are New York, Chicago, Los Angeles, Detroit, Boston, Washington, Houston, Dallas, Denver, San Antonio, Little Rock, Sacramento, Anchorage, Scranton, Pa.; Trenton, N.J.; Wilkes-Barre, Pa.; Slidel, La; York, Pa; Columbia, Mo.; Cookesvile, Tenn; and Green Bay, Wis. 1987 Editor & Publisher Yearbook.

10. Decline of Competition at 67. Market segmentation in the newspaper industry means (1) tailoring the newspaper's content to appeal to a particular segment or niche of the market or (2) using features within the context of the existing newspaper to appeal to various separate market segments. In the Matter of: Application by Detroit Free Press, Incorporated, and the Detroit News, Inc., for Approval of a Joint Newspaper Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. Sec. 1801, et. seq. Applicants' Proposed Findings of Fact and Conclusions of Law and Supporting Memorandum of Law [hereinafter Applicant's Proposed Facts] at 128. para. 338.

11. Decline of Competition at 67.

12. Id. at 68-70.

13. In competitive newspaper markets, the effect of the relationship between circulation and advertising demand allows the newspaper with the greater advertising and relevant circulation to strengthen its position further. Applicants' Proposed Facts, at 23, para. 62.

The local character of newspaper markets tends to restrict the size of newspaper markets. A newspaper could seek to expand into other markets by adding to its content so as to appeal to communities beyond the newspaper's home community. But the more communities a newspaper seeks to cover, the less news about them it will be able to print due to space and staffing constraints. Comment, The Newspaper Preservation Act: An Ineffective Step in the Right Direction, 12 B.C. Ind. & Comm. Rev. 937, (1970) at 938 [hereinafter Step in Right Direction].

14. In the Matter of: Application by Detroit Free Press, Incorporated, and the Detroit News, Inc., for Approval of a Joint Newspaper Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. Sec. 1801, et. seq. Antitrust Division's Proposed Findings of Fact and Conclusions of Law [hereinafter Antitrust Division's Proposed Findings] at 58, para. 240.

15. First copy costs are the editorial and production costs of producing the first copy of each day's newspaper. Once that copy is produced, scale economies begin to take hold whereby large circulations reduce the average first copy cost per copy printed. But, only if management costs remain constant R. Knox, Antitrust Exemptions for Newspapers: An Economic Analysis, 1971 Law & Soc. Order 3 at 16.

Testimony of James N. Rosse and James Dertouzos, 1 Proceedings of the Symposium on Media Concentration, Bureau of Competition, Federal Trade Commission (Dec. 14-15, 1978) [hereinafter Symposium on Media Concentration] at 81. But a newspaper will only increase circulation size until it reaches a point where the cost of acquiring additional audience and/or advertising customers exceeds the benefits. Id.

16. Id. at 77. The advantages of economies of scale that the larger newspaper enjoys include greater profits, charging lower prices and the ability to spend more to promote circulation and advertising. Applicants' Proposed Facts at 87, para. 224.

17. The cost of advertising itself does not prevent advertisers from advertising in newspapers with the most expensive advertising rates. Advertisers may choose that newspaper because it has desirable circulation unduplicated by the other newspaper. Antitrust Division's Proposed Findings at 30, para. 110.

Publishers argue that a junior newspaper may find itself forced to maintain a certain expenditure level to keep its product competitive with the dominant newspaper even though cost cutting would otherwise appear to be a prudent management decision. Applicants' Proposed Facts, at 122, para. 322.

18. Applicants' Proposed Facts, at 26, para. 68.

19. In the Matter of: Application by Detroit Free Press, Incorporated, and the Detroit News, Inc., for Approval of a Joint Newspaper Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. Sec. 1801, et. seq. Applicants' Reply Memorandum; Responses to Proposed Findings of Fact of the Antitrust Division and Intervenor; And Applicants' Proposed Counterfindings [hereinafter Applicants' Proposed Counterfindings] at 53, para. 86.

20. In the Matter of: Application by Detroit Free Press, Incorporated, and the Detroit News, Inc., for Approval of a Joint Newspaper Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. Sec. 1801, et. seq. Intervenor's Proposed Findings of Fact [hereinafter Intervenors' Proposed Facts] at 13, para. 42.

Newspapers that went out of business between 1968 and 1972 typically had only about 25 percent of the combined city circulation. Id. at 112-113, para. 460, 461.

Some publishers believe mismanagement and failure to remain journalistically competitive and not just economics has had a great deal to do with why some newspapers have fallen upon hard times. Failing Newspaper or Failing Journalism: The Public Versus the Publishers, 4 U.S.F. L. Rev. 465 (1970) at 473.

While publishers accept the downward spiral as natural law, they put little credence in the operation of the law in reverse. "This leads to the curious position that success is a function of perceptive management while failure is the result of a natural law." Knox, supra, at 14, note 37.

21. Hearings on H.R. 279 and Related Bills Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 91st Cong., 1st Sess. (1969) [hereinafter House Hearings] at 10.

22. The jointly-owned agency usually receives all revenues from advertising and circulation and pays production and operating costs. Profits are distributed to the agency newspapers according to negotiated formulas. From these profits newspapers pay their editorial costs. Hearings on S. 1312 Before Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. (1968) pt. 1 at 6, 7. JOAs are said to be efficiency enhancing because they make more efficient use of personnel and equipment. House Hearings at 13.

23. Through the use of combination advertising rates that new entrants would find difficult, if not impossible, to match and still survive, JOAs are said to erect high entry barriers. S. Barnett, Newspaper Monopoly and the Law, 30 J. of Comm. 72 (Winter 1980) at 77-78 [hereinafter Barnett, Newspaper Monopoly].

Publishers of suburban newspapers claim that combination rates JOA newspapers establish are so high that advertisers have few advertising dollars left after buying space in the JOA daily newspapers. S. Barnett, Monopoly Games -- Where Failures Win Big, 19 Colum. Journalism Rev. 42 (May/June 1980) at 44. [Hereinafter Barnett, Monopoly Games].

However, when the San Francisco JOA was challenged for its allegedly negative effect on suburban San Francisco area newspapers a court ruled that " . . . it is entirely rational for Congress to decide that daily newspapers are more vital to the well being of the nation and accordingly make rules or exceptions for dailies that are not made for bimonthlies." Bay Guardian v. Chronicle Publishing Co., 344 F.Supp. 1155, 1158, (N.D. Cal. 1972).

Some economists agree with the Antitrust Division that the creation of the Newspaper Preservation Act is bad policy for economic reasons. "No newspaper or any other unregulated business enterprise should be saved from failure at the expense of price-fixing or profit-pooling arrangements. [I]f a business concern, including a newspaper, can only be saved by eliminating all meaningful competition between it and its competitors, it would be better to let it disappear and, thus, make room for entry by a more robust competitor." Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1968) [hereinafter Hearings on S. 1520] (statement

of Richard McLaren, Ass't. Atty. Gen. in Charge of the Antitrust Div.), at 294-295.

Two studies have concluded that the Newspaper Preservation Act has had no adverse effect on suburban newspapers. W. Niebauer Jr., Trends of Circulation and Penetration Following Failure of a Metropolitan Daily Newspaper, unpublished paper presented at the annual convention of The Ass'n for Educ. in Journalism and Mass Comm., Aug. 1987, San Antonio, Tex.; W. Niebauer Jr., Effects of the Newspaper Preservation Act on the Suburban Press," 5 Newspaper Res. J. 41 (1984).

For critical reviews of the Newspaper Preservation Act see generally: J. Busterna, Commentary: Improving Editorial and Economic Competition with a Modified Newspaper Preservation Act, 8 Newspaper Res. J., 71 (1987); J. Martel and V. Haydell III, Judicial Application of the Newspaper Preservation Act: Will Congressional Intent be Relegated to the Back Pages? 1984 B.Y.U. L. Rev. 123; Comment, The Newspaper Preservation Act: Why it Fails to Preserve Newspapers, 17 Akron L. Rev. 435 (1984); Comment, The Newspaper Preservation Act: The Seattle Application, 1982 U. Ill. L. Rev. 669; J. Flynn, Antitrust and the Newspapers. A Comment on S. 1312, 22 Vand. L. Rev. 103 (1968-69); Note, Failing Newspaper or Failing Journalism: The Public Versus the Publishers, 4 U.S.F. L. Rev. 465 (1970); Note, Newspaper Preservation Act: A Critique, 46 Ind. L.J. 392 (1971); R. Knox, Antitrust Exemptions for Newspapers: An Economic Analysis, 1971 L. and the Social Order 3; Comment, The Joint Newspaper Operating Case: A Facelifting for the Failing Company Doctrine, 11 Ariz. L. Rev. 531 (1969); Comment, The Newspaper Preservation Act, 32 U. Pitt. L. Rev., 347 (1971); Note, The Newspaper Preservation Act, 49 Tex. L. Rev., 500 (1971); Note, Monopoly Newspapers, Troubles in Paradise, 7 San Diego L. Rev. 268 (1970); G. Barwis, The Newspaper Preservation Act: A Retrospective Analysis, 1 Newspaper Res. J. 27 (1980).

24. The lengthy review process may discourage the formation of joint agreements. See e.g., Comment, The Newspaper Preservation Act: Why It Fails to Preserve Newspapers, 17 Akron L. Rev. 435 (1984); J. Martel and V. Haydell III, Judicial Application of the Newspaper Preservation Act: Will Congressional Intent be Relegated to the Back Pages. 1984 B.Y.U. L. Rev. 123.

25. In the Matter of Application by Detroit Free Press, Inc., and the Detroit News, Inc., for Approval of a Joint Newspaper Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. sec. 1801, et seq. Department of Justice Docket No. 44-03-24-8.

26. The Baltimore Sun twice rebuffed the faltering Baltimore News American's request for a joint agreement, including a denial a week before the News American closed May 27, 1986. Good-Bye Baltimore, Editor & Publisher, May 31, 1986, at 16.

The Washington Post rejected a joint agreement with the Washington Star because the Post did not believe the joint revenue would be enough to offset the Star's losses. D. Holder, Joint Operating Agreements. If You Can't Beat 'Em, Join 'Em. 4 Wash.

Journalism Rev. 20 (November 1982) at 20. The afternoon Star ended publication on Aug. 7, 1981, leaving the morning Washington Post as Washington's sole daily newspaper until the Washington Times debuted in May 1982. Rev. Moon-owned Daily Debuts in Nation's Capitol, Editor & Publisher, May 22, 1982, at 15.

The dominant newspaper in a market may not have any economic incentives to join its weaker competitor in a JOA. "It would take a powerful lot of persuasion to convince the owner of the newspaper making 100 percent of the profit in a market that he should give up some of it to help keep his money-losing rival paper in business, noble as that action might be." J. Morton, The Shape of Things to Come, 5 Wash. Journalism Rev. 26 (April 1983) at 27.

JOA opponents argue that if the failing newspaper did not have a realistic chance to survive for at least a few years, then the dominant newspaper would not agree to share profits with the failing paper. Antitrust Division's Proposed Findings, at 40, para. 146-149.

27. Newspaper Act, Section 1803(b): "It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter."

28. The Newspaper Preservation Act defines a failing newspaper as one facing a "probable danger of financial failure." This standard had legislative history in the Bank Merger Act. 116 Cong. Rec. 23146 (1970) (remarks of Rep. Kastenmeier).

29. The Justice Department's procedures for reviewing post-1970 JOAs are found at 28 C.F.R. 48.1-48.16 (1981). Sec. 48.7 requires the Antitrust Division to recommend approval or disapproval no later than 30 days after the JOA application notice is published in the Federal Register.

If the Attorney General orders a hearing, the Antitrust Division is made a party, Sec. 48.10(b). The Newspaper Preservation Act is the only statute that makes the Antitrust Division an administrative agency.

30. The first version of the Newspaper Preservation Act did not distinguish between existing and future JOAs. Hearings on S. 1520, at 8, 9.

31. Newspaper Act, Section 1803(a). Although there is no power granted to the government to approve or disapprove JOAs formed before 1970, if a "grandfather" JOA were to seek to add another newspaper to its arrangement, that must win approval of the Attorney General. Id.

JOAs in existence before enactment of the Newspaper Preservation Act had merely to file their agreements and any subsequent amendments with the Justice Department. 28 C.F.R. 48.16 (1981).

In a challenge of the Honolulu JOA, which had formed well before passage of the Newspaper Preservation Act, a court held that entering a JOA was lawful so long as management of the failing newspaper " . . . acted in good faith that their newspaper was not likely to remain or become financially sound. . ." and " . . . that the only hope to maintain an editorial voice in the community was by combining the commercial portions of the two newspapers . . ." City & County of Honolulu v. Hawaii Newspaper Agency, 559 F.Supp. 1021, 1031 (D.C. Hawaii 1983).

The 22 pre-1970 JOAs and the year they formed: Albuquerque, N.M. (1933); El Paso, Tex. (1936); Nashville, Tenn. (1937); Evansville, Ind. (1938); Tucson, Ariz. (1940); Tulsa, Okla. (1941); Madison, Wis. (1948); Fort Wayne, Ind. (1950); Bristol, Tenn. (1950); Birmingham, Ala. (1950); Lincoln, Neb. (1950); Salt Lake City, Utah (1952); Shreveport, La. (1953); Franklin-Oil City, Pa. (1956); Knoxville, Tenn. (1957); Charleston, W. Va. (1958); Columbus, Ohio (1959); St. Louis, Mo. (1959); Pittsburgh, Pa. (1961); Honolulu, Haw. (1962); San Francisco, Cal. (1965) and Miami, Fla. (1966). H.R. Rep. No. 1193, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. Code Cong. and Admin. News 3549 [hereinafter Code News].

32. "Nothing contained in this chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity." Newspaper Act, Section 1803(c).

The antitrust exemptions of the Newspaper Act are specific and narrow. Bay Guardian v. Chronicle Publishing Co., 344 F.Supp. 1155, 1160, (N.D. Cal. 1972); America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc. 347 F.Supp. 328, 334 (D.C. Ind. 1972).

33. Newspaper Act, Section 1802(2).

34. Monopoly power has been defined as " . . . the power to control prices or exclude competition." United States v. Grinnel Corp. 236 F. Supp. 244, 248, 257, 258 (D.R.I. 1964), aff'd except as to decree, 384 U.S. 563, 570, 571, 576, 580 (1966).

35. Statement of the Antitrust Div. of the Dep't of Justice of Nov. 8, 1983. [Hereinafter Justice statement]. Obtained by the author from the Antitrust Div. See also C. Tozier, How Justice Department Viewed the St. Louis Joint Operating Agreement, 63 Journalism Quarterly, 503 (1986) at 504.

36. The pervasiveness of single newspaper markets has led courts to view the newspaper industry as a network of natural monopolies. In one of the few antitrust challenges that the Justice Department has made to a newspaper merger, a federal district court

found a merger of formerly competitive newspapers in Texas as the logical conclusion of a struggle for market dominance in which it was acknowledged by both competitors that only one was likely to survive. Thus the merger did not violate antitrust law even though it resulted in a monopoly newspaper market. United States v. Harte-Hanks 170 F.Supp. 227, 228, 229 (N.D. Tex. 1959). See also Union Leader Corp v. Newspapers of New England, Inc. 180 F.Supp. 125, 129 (D.C. Mass. 1960) ". . . there is every reason to believe that no matter what policies they had adopted, the market could not have brought them financial success . . ." Id. at 129.

37. Bristol was listed by the Justice Department as a pre-1970 JOA even though when its two newspapers consolidated into one newspaper in 1982, both newspapers were under common ownership.

38. The Antitrust Division applied a failing company test to the Oil City-Franklin JOA in 1985 when one of the JOA publishers proposed to buy out the other, thus bringing both newspapers under single ownership. Telephone interview with Alan R. Marx, Justice Department chief of general litigation at the time of the Globe investigation. (June 15, 1987) [hereinafter Marx Interview].

39. Amendment of December 22, 1983 to the St. Louis joint operating agreement. Document on file at the Antitrust Division and obtained from the Division by the author.

40. Barnett, Monopoly Games at 44.

41. Knox, supra, at 17.

42. "The mere possession of monopoly power does not ipso facto condemn a market participant. But, to avoid the proscription of Section 2, the firm must refrain at all times from conduct directed at smothering competition." Berkey Photo v. Eastman Kokak Co. 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

A company does not violate antitrust laws when monopoly is thrust upon it. United States v. Aluminum Co. of America 148 F.2d. 416 (2d Cir. 1945). Companies must be free to seek market dominance by skill and merit in technical attainment. Telex Corp. v. IBM Corp. 367 F. Supp. 258 (N.D. Okla. 1973) rev'd on other grounds, 510 F.2d 894 (10th Cir. 1975). Rule of Reason: Agreements that restrain trade are lawful if they merely regulate in such a way as to promote competition. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898); Standard Oil Co. v. United States 221 U.S. 1 (1911); Chicago Board of Trade v. United States 246 U.S. 231 (1918). Mergers or joint ventures are not unlawful if they are efficiency enhancing and not naked restrains of trade. Broadcast Music v. Columbia Broadcasting System 441 U.S. 1 (1979).

43. " . . . the antitrust exemption afforded by the Newspaper Preservation Act could be abused if publishers were free first to eliminate commercial competition by entering a joint operating arrangement in compliance with the Act and then to discontinue editorial competition by abandoning one of the two newspapers." Justice Statement.

44. "Although the Newspaper Preservation Act contains no provisions addressed to the discontinuance of the existing joint operating arrangement . . . the Act should not be read as requiring publishers who once obtain an exemption to continue their separate publications forever without regard to the magnitude of the financial losses involves." Id.

45. " . . . the Antitrust Division will in all cases require a convincing showing that at least one of the two newspapers to be covered by a prospective joint operating arrangement is in probable danger of financial failure. We will resist effort to invoke the Newspaper Preservation Act until the assertedly failing newspaper can clearly demonstrate that it is an actual financial drain on its publisher, not merely suffering a bookkeeping loss." Id.

46. The Newspaper Preservation Act has been held not to violate the First Amendment because it "does not confer any license to monopolize" but rather "is merely a selective repeal of the antitrust laws." 344 F. Supp. at 1157.

47. 418 U.S. 241 (1974).

48. "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." Id. at 258.

49. "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not . . . The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity." Associated Press v. United States, 326 U.S. 1, 20 (1945).

50. United States v. Times-Mirror Co., 274, F.Supp. 606, 612 (C.D. Calf. 1967), aff'd per curiam, 390 U.S. 712 (1967), reh. denied, 391 U.S. 971 (1968).

51. For refusing to sell advertising to advertisers who had purchased space from a rival of the refusing newspapers. Lorain Journal Co. v. United States, 342 U.S. 143, (1951); Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir. 1957), cert. denied, 354 U.S. 923 (1957).

52. Justice Statement.

53. Id.

54. Id.

55. Id.

56. Marx interview.

57. S. Barnett, What's the Score in St. Louis," 22 Colum. Journalism Rev. 20 (March/April 1984) at 20, 21 [hereinafter Barnett, What's the Score].

58. The Antitrust Division in early 1986 demanded the Colorado Springs Sun seek a buyer before closing and selling its presses, subscription lists and other assets to the Sun's chief competitor, the Colorado Springs Gazette-Telegraph. No buyer for the Sun came forth. The Colorado Springs papers did not have a joint agreement. Last Edition, Editor & Publisher, March 8, 1986, at 12.

59. J. Morton, St. Louis' Newspaper Blues, 6 Wash. Journalism Rev. 16 (January/February 1984) at 16.

60. Barnett, What's the Score, at 21.

61. Gluck bought the Globe For $500,000 with $50,000 down. Globe Goes Under with a Whimper, St. Louis Journalism Rev., Jan. 1986, at 17. [Hereinafter Globe Goes Under].

62. Prizes, Mergers Mark 134-year History of Globe-Democrat, St. Louis Post-Dispatch, Oct. 29, 1986, at 8A.

63. Id.

64. Among his debts was $450,000 still owned to Newhouse for the purchase of the Globe. Globe Goes Under at 17.

65. Like Gluck, Prentis and Franke were newspaper publishing novices. Prentis was a former banker and Franke a real estate developer. It's the Biggest Comeback Since Lazarus! St. Louis Journalism Rev., Feb. 1986, at 4.

66. As the Globe Turns III, St. Louis Journalism Rev., October 1986, at 6. [Hereinafter As the Globe Turns].

67. Globe Ceases Publication, St. Louis Post-Dispatch, Oct. 30, 1986, at A1, col. 1.

68. State Still Evaluating $2.4 Million Globe Request, St. Louis Journalism, Rev., Nov. 1986 at 6.

69. In its final year, the Globe had 23 percent of the St. Louis market's daily newspaper classified advertising and 25 percent of the retail advertising. Globe Ads, Circulation Up, St. Louis Journalism Rev., April 1986, at 10.

70. B. Doll, Antitrust Law Meets the Press, Nat'l L. J., Oct. 15, 1984, at 25.

71. By 1979, the News-Free Press had 54 percent of the total circulation in Chattanooga and 55 percent of the advertising share. the Times' circulation declined from 58,907 in 1975 to 51,072 in 1979. R. Picard, Evidence of a Failing Newspaper Under the Newspaper Preservation Act, 9 Newspaper Res. J., 73 (Fall 1987) at 77, 78.

72. Doll, supra, at 25.

73. The Chattanooga newspapers filed a JOA application March 24, 1980. On April 29, the newspapers asked for temporary approval, claiming the Times could only survive two or three more weeks before running out of money. The Antitrust Division on May 12 recommended that temporary approval be denied. Six days later, the Times fired 102 employees, ended its Sunday edition and began printing on the presses of the News-Free Press. A day later, the Attorney General formally denied the request for temporary authority to operate in a JOA. A month after that, the Attorney General reversed the decision and approved the JOA. Id. at 25, 26.

There was speculation the Attorney General's reversal was politically motivated. The Chattanooga Times was owned by the New York Times,Co. and President Jimmy Carter, who was running for reelection, did not want to offender one of the nation's most powerful newspapers. S. Barnett, Newspaper Regulation: New Problems for Justice Department, L. A. Daily J., Sept. 18, 1980, at S-1.

74. Before the Anchorage JOA formed, the Times had more than 73.1 percent of the circulation and 75 percent of the advertising shares in Anchorage. The News' circulation had dropped from 16,551 in 1965 to 15,079 in 1973. During the same period, Times circulation rose from 28,988 to 41,069. The News was losing $500,000 annually. Picard, supra, at 77-79.

75. The News filed suit charging the Times with mishandling the JOA. The Times paid the News $750,000 in a settlement, but the News had to prepare to resume full competition without a production facility and advertising and circulation departments. S. Barnett, The Anchorage Failure, 19 Colum. Journalism Rev. 42 (May/June 1980), at 42.

76. With McClatchy's backing the News expanded its reporting staff from 10 to 25, enlarged its newshole and increased the number of wire and syndicated services the News received. Id.

77. The News made the claim in a full page advertisement in a newspaper trade magazine. Editor & Publisher, Sept. 22, 1984, at 5. The News claimed to lead daily circulation 52,493 to 44,886 for the Times. The News also claimed 52 percent of the advertising market compared to 48 percent for the Times. Id.

78. See W. Shughart II and R. Tollison, The Welfare Basis of the 'Failing Company' Doctrine, 1985 The Antitrust Bull. 357.

79. Barnett, Newspaper Monopoly at 73

80. Some critics contend that JOAs charge a high rate for the large circulation newspaper and set the combination rate just beyond that. This makes the combination rate a "must buy" for advertisers since the second newspaper will reach some subscribers throughout the metropolitan area that neither the large circulation newspaper or suburban newspapers reach. Id. at 73, 75.

Suburban publishers contend that the retail department stores and grocery chains that make up much of newspaper advertising have to devote a disproportionate share of their print advertising dollars to purchasing space in the JOA newspapers. The advertisers have little money left for buying space in suburban newspapers. Note, Failing Newspaper or Failing Journalism: The Public Versus the Publishers, 4 U.S.F. L. Rev. 465 (1970), at 480.

81. M. Sentman, Advertising in Failed Newspapers: What Happens to the Money? Res. Rep. No. 15. Center for New Comm., Sch. of Journalism, Ind. U., Jan. 1986, at 2.

82. Id. at 7.

83. In a market of perfect competition, no one producer's actions would have a perceptible impact on the market because of the presence of many buyers and sellers. P. Areeda, Antitrust Analysis (1981), at 7.

84. Cantwell v. Connecticut, 310 U.S. 296 (1940); Cohen v. California, 403 U.S. 15 (1971); Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

85. A study that analyzed the content of 36 JOA newspapers published in 18 JOAs during 1964 and 1968 found similarity of news space allocation by type of news in all 18 JOAs. B. Ardoin, A Comparison of Newspapers Under Joint Printing Contracts, 40 Journalism Q. 340 (1973).

Another study compared content of the Shreveport, La. JOA newspapers with content of editorially competing newspapers under single ownership in New Orleans and Baton Rouge, La. The study found similarities in the general kinds of news published in all three cities, although the Shreveport newspaper had differing appearances and a lot of non-duplicated content." R. Hicks and J. Featherston, Duplication of Newspaper Content in Contrasting Ownership Situations, 55 Journalism Q. 549 (1978).

86. J. Busterna, Commentary, Improving Editorial and Economic Competition With a Modified Newspaper Preservation Act, 8 Newspaper Res. J., 71 (Summer 1987), at 74.

87. Id.

88. S. Bigman, "Rivals in Conformity: A Study of Two Competing Dailies," 25 Journalism Q. 127 (1948); G. Borstel, Ownership, Competition and Comment in 20 Small Dailies, 33 Journalism Q. 220 (1956); T. Donohue and T. Glasser, Homogeneity in Coverage of Connecticut Newspapers, 55 Journalism Q. 592 (1978); R. Entman, Newspaper Competition and First Amendment Ideals: Does Monopoly Matter? 35 J. of Comm. 147 (1985); G. Grotta, Consolidation of Newspapers: What Happens to the Consumer? 48 Journalism Q. 245 (1971); B. Litman and J. Bridges, An Economic Analysis of Daily Newspaper Performance, 7 Newspaper Res. J., 9 (1986); R. Nixon and R. Jones, The Content of Non-Competitive vs. Competitive Newspapers, 33 Journalism Q. 299 (1956); G. Rarick and B. Hartman, The Effects of Competition on One Daily Newspaper's Content, 43 Journalism Q. 459 (1966); J. Schweitzer and E. Goldman, Does Newspaper Competition Make a Difference to Readers? 52 Journalism Q. 706-10 (1975); W. Willoughby, Are Two Competing Dailies Necessarily Better Than One? 32 Journalism Q. 197 (1955).

89. Busterna, supra, at 74.

90. R. Entman, Newspaper Competition and First Amendment Ideals: Does Monopoly Matter? 35 J. of Comm. 147 (Summer 1985) at 160. Newspaper owners are unable to discern what differences variations in content will have on the market and they lack good evidence that consumers perceive major differences between competing newspapers. "[N]ews managers seek to build brand loyalty via ad campaigns emphasizing relatively minor stylistic differences; a columnist, comic strip or lotto game." Publishers may also place less emphasis on differences in news content in differentiating their newspapers because the First Amendment values of diversity of opinion and content, while important in the minds of many journalists, are relatively unimportant in the minds of many newspaper readers. They (readers) are not likely to fulfill the market model's implicit expectations of a vigilant readership surveying competing newspapers, detecting flaws in content, switching newspaper loyalties, and so forth." Id. at 161.

91. Comment, The Newspaper Preservation Act: Why it Fails to Preserve Newspapers, Akron L. Rev. 435 (1984) at 451.

92. The Free Press would publish breaking news on Saturday with the News responsible for the features sections. On Sunday, the News would be responsible for breaking news and the Free Press responsible for feature sections. Antitrust Division's Proposed Findings at 38, para. 142.